
IT' A SMALL WORLD AFTER ALL:
HOW DISNEY'S TARGETED ADVERTISEMENTS IMPLICATE
COPPA

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I. Introduction

The mission of the Walt Disney Company (“Disney”) is “to be one of the world’s leading producers and providers of entertainment and information.”² Disney is ranked as one of the world’s top ten most powerful brands and is certainly living up to that statement.³ With

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²See *About the Walt Disney Company*, THE WALT DISNEY CO. (2017), archived at <https://perma.cc/59RG-TB2G> [hereinafter *About*] (stating the company’s mission to development the most creative and profitable entertainment experiences in the world). To achieve this mission and be profitable, Disney strives to be creative and innovative in their content, services, and consumer products. *Id.*; see also Rafiq Elmansey, *Disney’s Creative Strategy: The Dreamer, The Realist and The Critic*, DESIGNORATE (2017), archived at <https://perma.cc/QB87-YDEY> (highlighting that “[i]n a way, Disney’s chosen medium of expression, the animated film, characterizes the fundamental process of all genius: the ability to take something that exists in the imagination only and forge it into a physical existence that directly influences the experience of others in a positive way.”). One of the advantages of Disney’s creative strategy method is balancing between both dream and reality to build a viable layout. *Id.*

³See Julien Rath, *The 10 Most Powerful Brands in the World*, BUS. INSIDER (Feb. 25, 2017), archived at <https://perma.cc/XCS4-4M3D> (ranking brands by their monetary

2018 revenues exceeding \$55 billion, Disney has earned its spot as number 55 on the 2018 Fortune 500 list and number 176 on the 2018 Fortune Global 500 list.⁴

Disney draws on treasured stories and characters from Disney, Pixar, and Marvel favorites to create interactive gaming experiences for “fans of all ages.”⁵ These gaming experiences are open to both children and adults, but require users to provide personal information such as email addresses, as well as enabling location tracking on mobile devices.⁶ A recent class action lawsuit begs the question: what happens when the “fans of all ages” using the mobile applications include children under the age of privacy consent?⁷ The plaintiffs allege that Disney mobile applications violate the law, by tracking users under the age of 13 without parental consent, in ways that facilitate “commercial exploitation.”⁸

As mobile applications become more prevalent and readily accessible in today’s online marketplace, concern for children’s

value and discerning the world’s most powerful companies are those whose financial value is most impacted by their branding).

⁴See *Fortune 500*, TIME INC. (Apr. 8, 2017), archived at <https://perma.cc/4FZC-A8KK> (recognizing the U.S. list represents two-thirds of the U.S.’s GDP with \$12 trillion in revenue); see also *Global 500*, TIME INC. (Apr. 8, 2017), archived at <https://perma.cc/AZR8-73AC> (highlighting the global list represents \$27.7 trillion in revenue); see also *Fortune 500*, TIME INC. (May 5, 2019), archived at <https://perma.cc/9PKT-VMSS> (providing 2018 rankings); see also *Global 500*, TIME INC. (May 5, 2019), archived at <https://perma.cc/P48X-5JTG> (quantifying 2018 Global rankings).

⁵See Brian Fung & Hamza Shaban, *These 42 Disney apps are allegedly spying on your kids*, WASH. POST (Aug. 7, 2017), archived at <https://perma.cc/ZP6U-R9ZP> (signifying that Disney has a strict compliance program and maintains strict data collection and use policies for applications created for children and families).

⁶See *id.* (discussing the collection of information through Disney mobile applications such as children’s email addresses, ages, and their full names).

⁷See *id.* (outlining the class action lawsuit filed against Disney in August of 2017 for privacy implications in Disney’s mobile gaming applications).

⁸See *id.* (alleging that Disney and its partners allowed the software companies to embed trackers in specific mobile applications and “[o]nce installed, tracking software can then ‘exfiltrate that information off the smart device for advertising and other commercial purposes’”). The activity of Disney collecting information about children, and then using this information for its own commercial, financial benefit by selling it to third-party advertisers amounted to “commercial exploitation” in the class action. *Id.*; *Commercial Exploitation*, WEX LEGAL DICTIONARY (Feb. 26, 2019), archived at <https://perma.cc/B4ZW-JMEB> (defining commercial exploitation as a “[t]erm that includes all activities used to benefit commercially from one’s property.”).

privacy grows.⁹ Children's apps often collect data about users without disclosing the practice to parents.¹⁰ Device identification and usage, phone number, and geolocation are some of the items tracked by embedded software in the mobile applications resulting in a cause for parental concern.¹¹ This collected data can then be packaged in a detailed profile and transferred or sold to advertising companies and analytic providers.¹² In an attempt to regulate this data extraction process, the Children's Online Privacy Protection Act ("COPPA") puts parents in control of consent before companies can collect information through embedded software.¹³ With this heightened protection for children, Disney is now in the spotlight, being accused of tracking children's habits through its mobile applications, without parental consent.¹⁴ It may be no coincidence that the marketing and advertisements users receive are based upon Disney's embedded software in its mobile gaming applications that evade parental consent.¹⁵

This Note will attempt to highlight the pending class action litigation against Disney by analyzing the legality of embedded software in Disney's mobile gaming applications under COPPA. First, this Note will undergo a history of the gaming industry and the regulations that have been enacted regarding online children's privacy. It will specifically focus on the 1998 COPPA regulation and the

⁹See Cameron Scott, *Little Progress on Privacy Practices of Children's Mobile Apps, FTC Study Finds*, ADWEEK (Dec. 10, 2012), archived at <https://perma.cc/Y3DA-KX4N> (noting how the mobile ecosystem is rapidly growing and privacy issues "aren't just going to fade away").

¹⁰See *id.* (observing that a significant amount of information is siphoned from mobile devices without disclosing the process to parents).

¹¹See *id.* (explaining that about 60% of user's unique device identification information was sent to third-parties, while only about 20% of the applications had information regarding privacy disclosures).

¹²See *id.* (detailing that private data from an individual's mobile device can end up with advertising companies and analytics providers).

¹³See *Children's Online Privacy Protection Rule: A Six-Step Compliance Plan for Your Business*, FED. TRADE COMMISSION (June 2017), archived at <https://perma.cc/P5CF-TJGV> (codifying that companies interacting with children under 13 are subject to COPPA regulations).

¹⁴See Fung & Shaban, *supra* note 5 (contending that Disney may have violated children's privacy protection polices in more than 40 of its mobile gaming applications).

¹⁵See Fung & Shaban, *supra* note 5 (questioning whether Disney has violated COPPA in its mobile gaming operating segment by embedding trackers into applications).

legislative history proceeding and anteceding its enactment. It will also provide a history of other litigation that has involved companies and COPPA violations. Second, this Note will present the creation and development of Disney's mobile applications and games, along with its financial strength in the entertainment industry. It will premise the mobile applications that are in question under the class action litigation. It will also premise the pleader's argument and the contrary argument of Disney. Then, this Note will analyze whether Disney has violated COPPA through its mobile gaming applications and the potential outcomes of the class action litigation. Finally, this Note will conclude with the likely outcome of settlement and what this result could mean for Disney and the mobile gaming industry.

II. History

A. History of the Gaming Industry

In 1991, the World Wide Web ("Internet") was first introduced.¹⁶ Computers were no longer simply used to send files back and forth between users; they became a gateway to an abundance of information that anyone could retrieve.¹⁷ By the next year, Congress believed that the Internet could be used for commercial purposes.¹⁸ With the support of Congress, companies in all industries were quick to set up websites.¹⁹ This would allow companies over the next few years to sell goods directly to consumers and increase their profit potential.²⁰ By 1993, the Internet became a part of the public

¹⁶See *The Invention of the Internet*, A&E TELEVISION NETWORK (Aug. 21, 2018), archived at <https://perma.cc/VJK3-2J29> (highlighting the development of the World Wide Web, by Tim Berners-Lee, a computer programmer in Switzerland).

¹⁷See *id.* (realizing how the Internet was a "web" of information and anyone who had access to the Internet could easily retrieve information).

¹⁸See *id.* (observing that shortly after the development of the Mosaic (later known as Netscape) browser, Congress saw the commercial value of the Internet).

¹⁹See *id.* (portraying that companies were quick to realize the potential value of the Internet and set-up websites of their own).

²⁰See *id.* (identifying that e-commerce entrepreneurs began to use the Internet to sell goods directly to customers); see also Marissa Fessenden, *What Was the First Thing Sold on the Internet?*, SMITHSONIAN MAG. (Nov. 30, 2015), archived at <https://perma.cc/WBR7-TTNN> (providing that one of the first rumored transactions was in August of 1994, where a man named Dan Kohn, who developed an online company called NetMarket, sold a CD of Sting's "Ten Summoner's Tales.").

domain, which allowed individual consumers to purchase monthly internet access through a service provider.²¹ The public's new ease of access, combined with companies setting up websites, quickly expanded the Internet to an online marketplace for goods and services.²²

In addition to information access and a marketplace for goods and services, users embraced the Internet for gaming.²³ Since its commercial introduction in the 1950's, gaming has developed into one of the world's most profitable entertainment industries.²⁴ In the 1970's, Intel's invention of the first microprocessor for personal computers led to the implementation of the technology in in-home gaming consoles.²⁵ With numerous companies attempting to penetrate the market with their in-home consoles and games, the market quickly became saturated and the industry experienced the 1983 North American Video Game Crash.²⁶ With this crash, in-home gaming consoles were on the decline, and the popularity of home computers was on the rise and personal computer gaming took on a

²¹See Riad Chikhani, *The History of Gaming: An Evolving Community*, TECH CRUNCH (Oct. 31, 2015), archived at <https://perma.cc/PHQ6-6DVB> (setting forth the timeframe of less than five years for public access to "online" gaming on internet in the early 1990's).

²²See *The Invention of the Internet*, *supra* note 16 (providing how public access to the Internet sparked companies to provide online availability of their services).

²³See Chikhani, *supra* note 21 (spotlighting how since the 1950's the gaming industry has boomed into one of the most profitable entertainment industries in the world). In the 1960's, Taito and Sega were the first companies to attract the public's attention with their introduction of arcade gaming and their coin-operated games gained significant popularity. *Id.* Observing the public's interest in these electro-mechanical games, 1972 brought Atari into the market. *Id.* After Atari's first successful electronic video game in 1973, arcade gaming materialized, and Arcade machines were popping up in bars, shopping malls, and bowling alleys. *Id.*

²⁴See Chikhani, *supra* note 21 (noting that more than 42% of Americans are gamers and four out of five U.S. households have a gaming console).

²⁵See Chikhani, *supra* note 21 (declaring Intel's microprocessor invention for personal computers was versatile and led to the development of in-home gaming consoles). Between 1972 and 1985, the gaming industry began to expand, and over 15 new companies penetrated the market. *Id.*

²⁶See Nadia Oxford, *Ten Facts about the Great Video Game Crash of '83*, IGN (Sept. 21, 2011), archived at <https://perma.cc/SM9X-2XA4> (discussing the market saturation that led to in-home gaming decline). Between 1981 and 1983, the increase of consoles in the market became too large with "not nearly enough compelling software to sustain them." *Id.*

new life.²⁷ By the early 1990's, developments in personal computers brought about multi-player gaming, where multiple users on different computers could play against each other.²⁸ With this, users saw the development of the Internet, and shortly thereafter, multiplayer gaming took on a new life.²⁹

Since the early 2000's, technological capabilities have greatly changed; the development of wireless internet, rapid computer processor technology, easier product accessibility, lower technology costs, and the development of smartphones and tablets have all contributed to the mobile gaming industry's success.³⁰ Mobile app stores entered the market in 2007 and changed the way people play games.³¹ Entertainment at users' fingertips has widened the gaming demographics and brought the gaming industry to the forefront of technological developments.³² In 2016 alone, the worldwide revenue of the mobile gaming market reached \$40.6 billion.³³ Additionally, 37 percent of the revenue generated in the gaming industry was

²⁷See Chikhani, *supra* note 21 (elaborating about P.C. game development during the sharp decline of in-home consoles). During the time consoles became unpopular, home computers rose in popularity due to their much more powerful processors which then led to advanced game development. *Id.*

²⁸See Chikhani, *supra* note 21 (delving into the world of multi-player gaming). Multiple users could play against each other by connecting MIDI-OUT and MIDI-IN ports with one another, however, this proved to cause lag-times in the gaming experience. *Id.*

²⁹See Chikhani, *supra* note 21 (explaining the development of the Internet in the early 1990's facilitated the multi-player technology). After perfecting the lag-times and user experiences with this multiplayer technology, the 2000's saw the developments of Sony, Xbox, and Nintendo. *Id.* It is estimated 3.2 billion people currently have access to the internet and at least 1.5 billion of these people play online video games. *Id.*

³⁰See Chikhani, *supra* note 21 (declaring changes over time have drastically and significantly improved gaming).

³¹See Chikhani, *supra* note 21 (stating the development of mobile gaming and that the move to mobile technology has defined the recent shift to mobile gaming). Millennials, especially, lead on-the-go lifestyles where mobile gaming has proven useful. *Id.*

³²See Chikhani, *supra* note 21 (stipulating technology companies such as Apple and Google invest in mobile gaming due to the companies game sale earnings from their appropriate application stores).

³³See John Ballard, *The Best Way to Invest in Mobile Gaming*, THE MOTLEY FOOL (Mar. 25, 2017), archived at <https://perma.cc/4MCC-MEXJ> (articulating industry revenues are very successful in the mobile gaming industry as shown by a report from Newzoo indicating that mobile game sales generate 37% of revenue in the video game industry).

attributable to the mobile gaming segment.³⁴ For example, a popular mobile gaming app, “Angry Birds,” made \$200 million alone, and exceeded 2 billion downloads in 2014.³⁵

B. Foundation of COPPA

So how does this affect children?³⁶ Kids under 13 spend an average of two hours per day playing mobile games.³⁷ Even before mobile gaming, however, the development of the internet raised concerns for children and their privacy.³⁸ Flashback to the 1993 public availability of the Internet.³⁹ The late 90’s and early 2000’s attracted many child users.⁴⁰ By 2001, 59 percent of children used the Internet.⁴¹ In a time when more than half of children were using the Internet, online privacy became a greater concern for parents.⁴² In the 1990’s, online privacy protection for children centered around child pornography and an attempt to prohibit the exploitation of children

³⁴See *id.* (discussing that mobile gaming supports a significant portion of the industry’s revenues, especially in today’s technological world).

³⁵See Chikhani, *supra* note 21 (highlighting that the mobile application, “Angry Birds,” has been enjoyed by millions of people since its development and accounted for \$200 million in 2012 alone).

³⁶See Kevin C. Tofel, *Kids under 13 spend an average of 2 hours a day playing mobile games*, GIGAOM (Jan. 28, 2015), archived at <https://perma.cc/4NPB-7EFH> (noting that children ages 2 to 12 years old spend a large portion of their day playing mobile games due to the ease of access).

³⁷See *id.* (explaining that the time children spend playing mobile games is due to the accessibility of games on a mobile device).

³⁸See Zuzanna Pasierbinska-Wilson, *The History of Data Privacy in Social Data and its Milestones*, EDATASIFT (Feb. 26, 2015), archived at <https://perma.cc/LN9B-58HH> (noting that in the mid to late 1990’s, “most online privacy protections were centered around the prevention of child pornography and its proliferation and also prohibiting the online exploitation of citizens under the age of consent.”).

³⁹See *The Invention of the Internet*, *supra* note 16 (reiterating the development of the Internet through a program called Mosaic, which offered a user friendly way to search the web). Mosaic, which later became Netscape, was developed in 1992 by a group of students and researchers at the University of Illinois. *Id.*

⁴⁰See MATTHEW DEBELL & CHRIS CHAPMAN, COMPUTER AND INTERNET USE BY CHILDREN AND ADOLESCENTS IN 2001: STATISTICAL ANALYSIS REPORT 5 (U.S. Dep’t of Edu.: Nat’l Ctr. for Edu. Stat., Oct. 2003) (noting children were a significant number of those using the Internet in the late 90’s and early 2000’s).

⁴¹See *id.* (quantifying the number of child-users on the internet as 58.5%).

⁴²See Pasierbinska-Wilson, *supra* note 38 (outlining privacy concerns for parents regarding the internet’s social atmosphere).

under the age of consent.⁴³ With this growing concern from parents, Congress became involved.⁴⁴ With the internet being new to consumers there were no protections for children online, and as a response to this lack of protection, Congress passed the Children's Online Privacy Protection Act ("COPPA") on October 21, 1998.⁴⁵ Primarily enforced by the United States' Federal Trade Commission ("FTC"), it provided regulations for child safety and gathering personal information from a child under the age of 13 online.⁴⁶

In enacting COPPA, Congress extended the protection only to children under 13, recognizing that children specifically under this age are susceptible and vulnerable to overreaching by marketing and may not understand the safety and privacy issues created by disclosing their personal information online.⁴⁷ COPPA applies to "any person who operates a website located on the Internet . . . who collects or maintains personal information from or about the users of or visitors to such website or online service".⁴⁸ These operators must obtain "verifiable parental consent" before they can collect

⁴³See Pasierbinska-Wilson, *supra* note 38 (discerning that originally child pornography was the concern behind the legislation and has evolved over time to marketing concerns).

⁴⁴ See Pasierbinska-Wilson, *supra* note 38 (presuming parents' concern for children's safety online caused the Federal Trade Commission to enforce the Children's Online Privacy Protection Act).

⁴⁵See Pasierbinska-Wilson, *supra* note 38 (citing the act that changed children's online privacy regulations, known as "COPPA"). In 2000, the Act required commercial websites to obtain parental consent before collecting, using, or disclosing personal information from children under 13. *Id.* COPPA set forth what a website operator must include in a privacy policy, when and how to seek verifiable consent from a parent or guardian when providing services or interacting with children, and what responsibilities an operator has to protect children's privacy and safety online, specifically including restriction on the marketing to those under 13. *Id.*

⁴⁶See Children's Online Privacy Protection, 15 U.S.C. § 6501 (1998) (codifying regulations for children and internet privacy). Defining the term "Child" to be an individual under the age of 13 and an "Operator" to be an individual that operates a website located on the internet and collects personal information about the users. *Id.* at (1).

⁴⁷See *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMMISSION (Mar. 20, 2015), archived at <https://perma.cc/U7RL-52D9> (stating why Congress chose 13 as the age proscribed in the legislation).

⁴⁸See 15 U.S.C. § 6501 (1)-(2) (discussing to whom COPPA applies in the context on website providers).

information from children.⁴⁹ This consent means “any reasonable effort . . . including a request for authorization for future collection, use, and disclosure . . . to ensure that a parent of a child receives notice of the operator’s personal information collection, use, and disclosure practices . . . before that information is collected from that child.”⁵⁰ This was the language that was passed by Congress in 1998 and was officially effective on April 21, 2000.⁵¹

Between 2000 and 2012, technological advancements, including developments in mobile technology, raised additional concerns for parents and the Federal Trade Commission.⁵² Mobile technology had not previously been addressed in the original COPPA enactment, and concerns grew about how to apply the enacted rules to mobile gaming operators.⁵³ On December 19, 2012, the Commission issued an amended COPPA rule which took effect on July 1, 2013.⁵⁴ Due to the advancements in technology from when the rule was first enacted, the amended rule provided for broader protection.⁵⁵ The amendment broadened the definition of what qualifies as a website or online service directed to children to include the scope of mobile applications.⁵⁶ The new rule makes it clear

⁴⁹*See id.* at (9) (highlighting the need for parental consent before children can engage in web-based sites and services).

⁵⁰*See id.* (defining that parents need to consent before the operators may collect data).

⁵¹*See Complying with COPPA: Frequently Asked Questions*, *supra* note 47 (clarifying the date the legislation was officially enacted).

⁵²*See id.* (understanding the need for additional protection). Parents worry about defining the scope of COPPA and whether COPPA will adequately protect their children from pornography and prevent from misrepresenting their ages in order to register for websites with age restrictions. *Id.*

⁵³*See id.* (addressing concerns regarding how to apply the legislation to mobile gaming operators).

⁵⁴*See id.* (recognizing the amendment to the original COPPA legislation to broaden the scope of COPPA legislation).

⁵⁵*See FTC’s revised COPPA Rule: Five need-to-know changes for your business*, FED. TRADE COMMISSION (Dec. 19, 2012), *archived at* <https://perma.cc/93NX-SYBQ> (stressing the new guidelines for COPPA).

⁵⁶ *See* Children’s Online Privacy Protection Rule, 16 C.F.R. § 312.2 (2013) (revising the definition of online service or website); *see also id.* at § 312.3 (highlighting the general requirements to avoid unfair or deceptive acts regarding children using the internet). The regulation provides that:

It shall be unlawful for any operator of a Web site or online service directed to children, or any operator that has actual knowledge that it is collecting or maintaining personal information from a child, to collect personal information from a child in a manner that

that “operator” covers an “operator of a child-directed site or service,” which mobile applications would now fall under.⁵⁷ It also broadened the definition of personal information to include items such as geolocation and device identifiers, which were not around during the initial enactment.⁵⁸ The definition of “personal information” now includes “geolocation information and device identification, as well as photos, videos, and audio files that contain a child’s image or voice,” which are all capabilities available in mobile technology.⁵⁹

C. COPPA Today

As enacted today, the primary goal behind COPPA is to put parents in control of what information is collected from their children

violates the regulations prescribed under this part. Generally, under this part, an operator must: (a) Provide notice on the Web site or online service of what information it collects from children, how it uses such information, and its disclosure practices for such information; (b) Obtain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children; (c) Provide a reasonable means for a parent to review the personal information collected from a child and to refuse to permit its further use or maintenance; (d) Not condition a child’s participation in a game, the offering of a prize, or another activity on the child disclosing more personal information than is reasonably necessary to participate in such activity; and (e) Establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children.

Id.

⁵⁷*See id.* (noting the broad scope to cover mobile gaming). COPPA applies to “operators of commercial websites and online services (including mobile apps) directed to children under 13 that collect, use, or disclose personal information from children, and operators of general audience websites or online services with actual knowledge that they are collecting, using, or disclosing personal information from children under 13.” *Id.*

⁵⁸*See id.* (expanding the definition of personal information to include aspects such as a personal home address or social security number).

⁵⁹*See id.* (addressing the new technology available with mobile devices). Mobile devices have opened doors to a whole new world of gaming, “including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire, radio, or other methods of transmission.” *Id.*

online.⁶⁰ COPPA specifically enacts a notice requirement to ensure that parents can have control of their children's information being shared online.⁶¹ COPPA clarifies that notice must be sent to parents prior to the collection of any personal information from children.⁶² The notice to parents must contain certain key information, and must be within the four corners of the notice itself, and companies cannot simply send a link to an online notice.⁶³ Companies must also send this notice directly to the parent (an option would be using an email address) and must post a prominent and clearly labeled link to an online notice of its information practices with regard to children on the home or landing page of its website or online service.⁶⁴ However, while the amended rule clearly lays out how to collect new notice, questions arise concerning the information that companies already collected prior to the amendment that was not considered personal information at that time, but which now is considered personal information under the amended rule.⁶⁵ The Federal Trade

⁶⁰See *Complying with COPPA: Frequently Asked Questions*, supra note 47 (focusing on parental concern as the most important driving factor behind legislation).

⁶¹See 16 C.F.R. § 312.4 (identifying the notice requirement of an operator). An "operator":

[must] make reasonable efforts, taking into account available technology, to ensure that a parent of a child receives direct notice of the operator's practices with regard to the collection, use, or disclosure of personal information from children, including notice of any material change in the collection, use, or disclosure practices to which the parent has previously consented.

Id.; see also *Complying with COPPA: Frequently Asked Questions*, supra note 47 (outlining the notice requirement to include methods for obtaining parental consent, strengthening data security protections, data retention and deletion procedures, and strengthening the Commission's oversight of self-regulatory safe harbor programs).

⁶²See *Complying with COPPA: Frequently Asked Questions*, supra note 47 (clarifying the notice requirement companies must comply with when directing their services to children under the age of 13).

⁶³See *Complying with COPPA: Frequently Asked Questions*, supra note 47 (explaining how parents should receive notice that is clear and effective). The notice on the four-corners of the document means that companies must clearly state their policies in a document and cannot cite to other sources or refer to other sources in their notice document. *Id.*

⁶⁴See *Complying with COPPA: Frequently Asked Questions*, supra note 47 (clarifying the four instances when a direct notice is appropriate including: verifiable consent, notice of a child's activities, communicating with a child multiple times, and collecting information to protect a child's safety).

⁶⁵See *Complying with COPPA: Frequently Asked Questions*, supra note 47 (questioning mobile applications directed towards children). Even after the passage

Commission has clarified that companies must obtain notice right away, but only for certain prior information they collected which now falls under the amended rule.⁶⁶

D. Prior COPPA Litigation

Despite this effort to protect children with the enactment of COPPA, there is a history of companies that allegedly fail to abide by the regulation.⁶⁷ Less than one year after the original effective date

of the legislation, companies were still unsure about how they could effectively comply with COPPA. *Id.*

⁶⁶See *Complying with COPPA: Frequently Asked Questions*, *supra* note 47 (highlighting the new categories of personal information that fall under the amended COPPA rule and if notice of prior collection needs to be obtained). The FTC provided that:

If you have collected geolocation information and have not obtained parental consent, you must do so immediately . . . [and] [i]f you have collected photos or videos containing a child's image or audio files with a child's voice from a child prior to the effective date of the amended Rule, you do not need to obtain parental consent . . . [P]hotos, videos, and audio, [and] any newly-covered screen or user name collected prior to the effective date of the amended Rule is not covered by COPPA, although we encourage you as a best practice to obtain parental consent if possible. A previously-collected screen or user name is covered, however, if the operator associates new information with it after the effective date of the amended Rule . . . Persistent identifiers were covered by the original Rule only where they were combined with individually identifiable information. Under the amended Rule, a persistent identifier is covered where it can be used to recognize a user over time and across different websites or online services. Consistent with the above, operators need not seek parental consent for these newly-covered persistent identifiers if they were collected prior to the effective date of the Rule. However, if after the effective date of the amended Rule an operator continues to collect, or associates new information with, such a persistent identifier, such as information about a child's activities on its website or online service, this collection of information about the child's activities triggers COPPA.

Id.

⁶⁷ See *FTC Announces Settlements with Web Sites That Collected Children's Personal Data Without Parental Permission*, FED. TRADE COMMISSION (Apr. 19, 2001), archived at <https://perma.cc/6CA7-YVWD> [hereinafter *Web Sites*] (acknowledging the companies that were in violation of COPPA, including The FTC charged Monarch Services, Inc. and Girls Life, Inc., operators of www.girlslife.com;

of COPPA in April 2000, three website operators violated the regulation.⁶⁸ Monarch Services Inc., Girls Life Inc., and Looksmart Ltd. were allegedly illegally collecting personal information from children under 13 without parental consent by requiring children to provide personal information when signing up for their services.⁶⁹ The FTC alleged that these companies collected personal information from children, including items such as full name, home address, e-mail address, and telephone number.⁷⁰ The FTC argued that a look at the companies' websites revealed there were no posted privacy policies that complied with the Act or required parental consent for children under 13.⁷¹ The companies did not admit to any wrongdoing, and instead decided to settle by paying a combined total of \$100,000 in civil penalties for their COPPA violations.⁷² Specifically, a spokeswoman for the websites claimed they never retained personally identifying information, and she emphasized that they did not admit liability or wrongdoing under the settlement and that the fines paid "were for settlement purposes only and only to avoid costly and threatened litigation by the FTC."⁷³ Additionally, the companies agreed to delete all personally identifiable data since the effective date of COPPA, which they completed shortly after the settlement negotiation.⁷⁴

Shortly thereafter, in February of 2003, the Federal Trade Commission issued the largest civil penalties since the effective

Bigmailbox.com, Inc. and Nolan Quan, operators of www.bigmailbox.com; and Looksmart Ltd., operator of www.insidetheweb.com with illegally collecting personally identifying information from children under 13 years of age without parental consent).

⁶⁸ See *id.* (tracing the first COPPA violations to within the first year of effective enactment).

⁶⁹ See *id.* (exposing the first three companies that violated COPPA).

⁷⁰ See *id.* (addressing that the specific allegations in violation of COPPA involved the collection of children's information without the consent of parents).

⁷¹ See *id.* (qualifying the violations as a lack of privacy notice). Privacy notice is required per COPPA to ensure that parents have a say in what information is collected from their children. *Id.*

⁷² See *Web Sites, supra* note 67 (stipulating all three defendants agreed to settle the litigation). Settlement was the financially viable option. *Id.*

⁷³ See William L. Watts, *FTC fines firms for privacy violations*, MARKETWATCH (Apr. 19, 2001), archived at <https://perma.cc/X8ZZ-BA7T> (articulating the silence regarding wrongdoing on behalf of the company fined with COPPA violations).

⁷⁴ See *Web Sites, supra* note 67 (recognizing that only data gathered after the effective date of the COPPA needed to be deleted, and that consumers are now able to find helpful information about COPPA on the FTC website).

enactment of the COPPA legislation.⁷⁵ Mrs. Fields Cookies and Hershey Foods Corporation allegedly failed to obtain verifiable parental consent before collecting online personal information from children under 13.⁷⁶ The FTC argued that both companies failed to post privacy policies, failed to provide direct notice to parents about the information they were collecting and how it would be used, and failed to provide a reasonable means for parents to review the personal information collected from their children.⁷⁷ Mrs. Fields' main landing webpage at www.mrsfields.com offered an advertisement to click and sign-up for a birthday club for a child 12 or under, and with this sign-up they provided birthday greetings and coupons for free cookies or pretzels.⁷⁸ Hershey maintained more than 30 websites, many of which were candy-related and appealed to children.⁷⁹ Hershey engaged children with a "Kidztown" section of their website that required sign-

⁷⁵See *FTC Receives Largest COPPA Civil Penalties to Date in Settlements with Mrs. Fields Cookies and Hershey Foods*, FED. TRADE COMMISSION (Feb 27, 2003), archived at <https://perma.cc/FVB9-TTYC> [hereinafter *Largest COPPA Civil Penalties*] (detailing that Ms. Fields Cookies and Hershey Foods Corporation both violated COPPA when they failed to obtain verifiable parental consent before collecting personal information from children under 13 and failed to post adequate privacy policies).

⁷⁶See *id.* (stipulating both defendants failed to obtain parental consent by employing a method of obtaining parental consent that does not meet the standard delineated under COPPA Rule). It was analyzed that:

These Web pages offered birthday clubs for children 12 or under and provided birthday greetings and coupons for free cookies or pretzels. While Mrs. Fields did not disseminate the information it collected to third parties, the company allegedly collected personal information - including full name, home address, e-mail address and birth date - from more than 84,000 children, without first obtaining parental consent. Hershey operates more than 30 Web sites - many of which are candy-related sites directed to children.

Id.

⁷⁷See *id.* (recalling that Mrs. Field and Hershey did not provide direct notice about the information collected or how the information would be used).

⁷⁸ See *id.* (reviewing the specific children's program in question). The information Mrs. Fields obtained included the full name, home address, e-mail address, and date of birth from more than 84,000 children, without first obtaining parental consent. *Id.*

⁷⁹See *id.* (offering the allure of Hershey's websites to children). A number of websites use the tactic of offering children-related themes, such as candy, to gain the child's attention and want them to use the site. *Id.* Once the children are on these websites, Hershey "allegedly employed a method of obtaining parental consent that does not meet the standard delineated under the COPPA Rule" *Id.*

up upon accessing this section.⁸⁰ Also, within this section, Hershey advertised sweepstakes and contests where children could click and sign-up in an effort to win prizes and free candy.⁸¹ Hershey instructed children under 13 to have their parents fill out an online parental consent form.⁸² The FTC alleged Hershey took no additional steps to ensure that a parent or guardian actually acknowledged the consent form.⁸³ The FTC also alleged that even if a parent did not submit the consent form, the company still collected items including full name, home address, e-mail address, and age.⁸⁴ Both Mrs. Fields and Hershey did not admit to any wrongdoing, and instead decided to settle the FTC charges, where Mrs. Fields paid civil penalties of \$100,000 and Hershey paid civil penalties of \$85,000.⁸⁵

Following the 2003 settlement, there were numerous other companies who incurred online website violations, but it wasn't until

⁸⁰See 4 MICHAEL D. SCOTT, SCOTT N INFORMATION TECHNOLOGY LAW § 16.17 (3rd ed. 2019) (describing the method of Hershey attempting to obtain parental consent). Parents were required to sign the parental consent form upon first click on the “Kidztown” section. *Id.*

⁸¹See *id.* (noting that Hershey attempted to collect parental consent for sweepstakes entries). The sweepstakes’ registration page informed children under 13 that they must receive parental consent prior to entering the sweepstakes and a “Parental Consent” form appeared. *Id.* The form asked for the parent’s name, the child’s name, and the home address. *Id.* The parent was then required to click a box to consent. *Id.* After clicking the box, a sweepstakes registration form automatically appeared and asked for additional information such as email address, gender, and age range. *Id.* The FTC showed that there was no way for Hershey to ensure a parent was filling out the form. *Id.* Even if the “Parental Consent” form was left blank, it was still accepted by Hershey. *Id.*

⁸²See *Largest COPPA Civil Penalties*, *supra* note 75 (providing Hershey’s guidelines for consent where a “Parental Consent” form needed to be filled out before access to any sweepstakes).

⁸³See *Largest COPPA Civil Penalties*, *supra* note 75 (alleging the ineffectiveness of the consent form because there was no way for Hershey to know if a parent had filled out the form or if it was submitted by the child posing as a parent).

⁸⁴See *Largest COPPA Civil Penalties*, *supra* note 75 (highlighting the information obtained from children after the “Parental Consent” form was submitted).

⁸⁵See *Largest COPPA Civil Penalties*, *supra* note 75 (stating that litigation resulted in a settlement with the FTC). The COPPA case was the first of its kind to challenge the manner in which a company obtains parental consent, but it is not stated why the companies chose to settle instead of going to litigation. *Id.* “The settlements bar future COPPA violations, require that the companies delete any information collected in violation of COPPA, require civil penalty payments, and contain certain record-keeping requirements to allow the FTC to monitor the companies’ compliance with the order.” *Id.*

2011 when the Federal Trade Commission brought its first COPPA case against a mobile application.⁸⁶ The Federal Trade Commission charged W3 Innovations with violations of COPPA.⁸⁷ Many of W3 Innovations' apps were specifically directed to children, and were listed in the Games-Kids section of Apple's App Store.⁸⁸ The FTC alleged that W3 collected and maintained thousands of email addresses through its apps and allowed children under 13 to publicly post personal information on message boards, all without verifiable parental consent.⁸⁹ W3 did not argue their case, and instead decided to settle, where the FTC received \$50,000 in civil penalties and W3 agreed to delete all information about children collected through its apps, which it did shortly after the settlement.⁹⁰

More recently, in 2015, two additional application developers were charged with COPPA violations.⁹¹ These cases were the first in

⁸⁶See Ronald Y. Rothstein, *FTC Brings First COPPA Case Against Mobile Apps*, WINSTON & STRAWN LLP (Aug. 15, 2011), archived at <https://perma.cc/U7ZK-ZM3L> (recalling the first COPPA violation case involving the mobile gaming segment of the gaming industry).

⁸⁷See *Mobile Apps Developer Settles FTC Charges It Violated Children's Privacy Rule*, FED. TRADE COMMISSION (Aug. 15, 2011), archived at <https://perma.cc/ZMU3-H5F4> [hereinafter *Mobile Apps*] (discussing how the company was charged with COPPA violations). According to the complaint, W3 did not provide notice of their collection practices and did not obtain verifiable parental consent before collecting and disclosing personal information from children. *Id.*

⁸⁸See *id.* (pointing to the apps that were directed towards children). The applications targeted to children included Emily's Girl World, Emily's Dress Up, Emily's Dress Up & Shop, and Emily's Runway High Fashion. *Id.* The apps allowed children to play games such as Cootie Catcher and Truth or Dare, and to create virtual models and design outfits. *Id.* The apps also encouraged children to email "Emily" their comments about the games and submit blogs to "Emily's Blog" via email. *Id.* There have been more than 50,000 downloads of these apps. *Id.*

⁸⁹See *id.* (listing the specific COPPA violations). In addition to collecting and maintaining children's email addresses, the FTC alleged that the defendants allowed children to publicly post information on message boards and blogs through the "Emily" games. *Id.* These postings did not require any parental consent at all. *Id.* Children were free to share their email address and information on the blogs and message boards without any parental consent. *Id.*

⁹⁰See *id.* (summarizing the outcome of the litigation); Kristen J. Mathews, *FTC Fines First Mobile App Developer for COPPA Violation*, PROSKAUER PRIVACY LAW BLOG (Aug. 18, 2011), archived at <https://perma.cc/T5SC-U955> (detailing agreements W3 made as part of its settlement with the FTC).

⁹¹See *Two App Developers Settle FTC Charges They Violated Children's Online Privacy Protection Act*, FED. TRADE COMMISSION (Dec. 17, 2015), archived at

which the Federal Trade Commission alleged that companies allowed advertisers to use the collected information to advertise to children.⁹² In charges against LAI Systems LLC, the FTC alleged that the company created apps directed to children, including My Cake Shop, My Pizza Shop, and Hair Salon Makeover, which allowed third-party advertisers to collect personal information from children in the form of “persistent identifiers,” which allow companies to track individual users’ information and data across different gaming platforms.⁹³ The FTC argued that LAI did not give notice or receive consent from parents about this collection process.⁹⁴ Similarly, in charges against Retro Dreamer, the FTC argued that the company created apps directed to children, including Ice Cream Jump, Happy Pudding Jump, and Sneezies, which also allowed third-party advertisers to collect personal information through persistent identifiers without parental consent or notice.⁹⁵ As a result, LAI and

<https://perma.cc/RLN7-AJU8> [hereinafter *Two App Developers*] (highlighting more recent litigation involving companies such as LAI Systems, LLC and COPPA).

⁹²See *id.* (describing the first litigation involving the collection of information for the purpose of administering it to advertising companies).

⁹³See *id.* (noting how the companies used persistent identifiers to collect information for advertisers); see also Jessica Davies, *WTF is a persistent ID?*, DIGIDAY (Mar. 8, 2017), archived at <https://perma.cc/ZS8H-VZKU> (defining persistent identifier).

A persistent identifier is: an identifier that can provide a single view of an individual across numerous devices — across desktop, mobile web, and in-app, without duplication. This ID is formed using deterministic data . . . which is gathered from log-ins. If a person logs in to a social media or email account, or any online account, and remains logged-in, they can then be recognized wherever they are on the web or mobile. So for marketers, better data.

Id.

⁹⁴See *Two App Developers*, *supra* note 91 (pointing to the lack of parental consent). The company did not maintain any policies to obtain parental consent. *Id.* They were collecting data from children the entire time of operation without receiving parental consent. *Id.*

⁹⁵See *Two App Developers*, *supra* note 91 (stating that “[t]wo app developers will pay a combined \$360,000 in civil penalties as part of settlements with the Federal Trade Commission over charges they violated the Children’s Online Privacy Protection Act”). These ad networks would then tailor their ads and marketing to children based on the information that they purchased from Retro Dreamer. *Id.*; see also Allison Grande, *FTC Expands Child Data Protections In Mobile App Action*, LAW360 (Jan. 6, 2016), archived at <https://perma.cc/5ZWW-7UVR> (discussing the similar charges against LAI and Retro Dreamer). Retro Dreamer was also selling the information they collected to third-party ad networks for a fee, just like LAI. *Id.*

Retro Dreamers did not argue their cases and instead settled with the FTC for \$60,000 in civil penalties and \$300,000 in civil penalties, respectfully.⁹⁶

It is important to understand that with all these settlement situations, the Federal Trade Commission is not finding or ruling that the defendants have actually violated the law.⁹⁷ The Federal Trade Commission only authorizes the filing of a complaint when it has “reason to believe” that the law has been violated and the FTC believes the violation affects the public.⁹⁸ This consent decree provided by the defendants is for settlement purposes only and does not constitute an admission by the defendants of a law violation.⁹⁹ Therefore, while there are allegations against these companies, they are never actually found to be “guilty” of any COPPA violations.¹⁰⁰

Since COPPA’s most recent amended rule, parents have expressed concern regarding the cases settled by the FTC and about the effectiveness of COPPA legislation.¹⁰¹ As evident from examples of COPPA settlements, penalties tend to remain insignificant in the

Also, similar to LAI, Retro Dreamer did not have any parental consent procedure in place during their entire time of operation. *Id.*

⁹⁶See *Two App Developers*, *supra* note 91 (recognizing the litigation ended with settlement after violating COPPA).

⁹⁷See *Mobile Apps*, *supra* note 87 (articulating that the Federal Trade Commission “authorizes the filing of a complaint when it has “reason to believe” that the law has been or is being violated,” but ultimately doesn’t have the authority to enforce the law).

⁹⁸See *Mobile Apps*, *supra* note 87 (discussing how the FTC can file a complaint to the Commission on behalf of the public against companies they believe to have violated COPPA). “The Commission authorizes the filing of a complaint when it has “reason to believe” that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest.” *Id.*

⁹⁹See *Mobile Apps*, *supra* note 87 (focusing on the importance of the no-fault settlement process for defendants to complaints regarding COPPA).

¹⁰⁰See *Mobile Apps*, *supra* note 87 (differentiating a settlement process and a court trial and the effects on guilt and innocence); see also Jeremy Meisinger, *Security, Privacy And The Law*, FOLEY HOAG LLP (Jan. 17, 2018), archived at <https://perma.cc/PJN5-4LBH?type=image> (discussing how COPPA policies need to change following settlement cases).

¹⁰¹See Lauren A. Matecki, *COPPA is Ineffective Legislation! Next Steps for Protecting Youth Privacy Rights in the Social Networking Era*, NW. J. L. & SOC. POL’Y. 369, 374 (2010) (articulating that an FTC survey revealed that 97% of parents believe that a company’s website should not have the power to sell their child’s information to a third party, and 72% of parents also objected to the collection of their child’s name or address).

grand scheme of a company's business operations.¹⁰² Parents of several consumer privacy advocacy groups have requested the FTC to consider revisions to COPPA and the fines assessed when companies have alleged COPPA violations.¹⁰³ Parents have expressed that a higher burden must be placed on website and mobile gaming operators, potentially through more significant fines, in order to force companies to actually abide by COPPA requirements.¹⁰⁴ Additionally, parents want the FTC to better monitor companies' COPPA policies and suggest that the FTC enforce better notice, clearer consent, and easier access to operators' information policies and security practices.¹⁰⁵ Overall, with the high concern for children's safety, parents urge the FTC and lawmakers to take COPPA violations seriously, hence the current Disney lawsuit.

III. Premise

A. Mobile Gaming

Since the introduction of the first mobile-app store in 2007, the global gaming industry has seen consistent revenue growth.¹⁰⁶ In 2016, the revenue from gaming applications was around \$40 billion

¹⁰²See *FTC Increases Maximum Civil Penalties for HSR Act, COPPA, and Other Violations from \$16,000 to \$40,000*, WILSON SONSINI GOODRICH & ROSATI (July 5, 2016), archived at <https://perma.cc/SDE8-9KGZ> (depicting how FTC COPPA cases are regulated under civil actions and companies that violate COPPA are assessed civil penalties). In terms of COPPA violation fines, the maximum civil penalty per COPPA violation was \$16,000; as of August 2016, this amount has been raised to \$40,000 per violation. *Id.* Typically, companies achieve revenues in the billions, and these fines are extremely small percentages of their overall profits. *Id.*

¹⁰³See Matecki, *supra* note 101, at 397 (criticizing COPPA regulations as ineffective means of ensuring the protection of children's personal information online).

¹⁰⁴See Matecki, *supra* note 101, at 397 (addressing the financial benefit companies receive from targeted market efforts).

¹⁰⁵See Matecki, *supra* note 101, at 397 (arguing for better monitoring of company's COPPA policies to ensure that children are protected when using their web-based services).

¹⁰⁶See Dean Takahasi, *Mobile game revenue will grow 66% from \$38 billion in 2016 to \$65 billion in 2020*, NEWZOO (Apr. 26, 2017), archived at <https://perma.cc/R9P3-VC5V> [hereinafter *Mobile Games Revenue*] (depicting revenue growth in the mobile gaming industry).

worldwide.¹⁰⁷ By 2020, it is projected that this revenue will exceed \$65 billion.¹⁰⁸ At the end of 2016, 2.3 billion consumers actively used a smartphone, which equates to about 31 percent of the total population.¹⁰⁹ By 2020, it is projected that 3.6 billion smartphone users, close to half of the world's population, will actively use a smartphone.¹¹⁰ Specifically focusing on children in the U.S., spending on kids' mobile games makes up 9.3 percent of all mobile gaming revenue, which equates to approximately \$38,781,000 out of a total \$417,000,000.¹¹¹ This revenue is supported by kids under 13 spending an average of two hours per day on mobile devices.¹¹²

B. The Business of Disney

Disney operates in four business segments: Media Networks, Parks and Resorts, Studio Entertainment, and Consumer Products & Interactive Media.¹¹³ The Consumer Products & Interactive Media segment accounts for more than \$5.52 billion of Disney's total revenue.¹¹⁴ Under this operating segment are four main lines of

¹⁰⁷*See id.* (highlighting annual revenue from 2016 and stating that there has been consistent growth year after year with the advancements in technology).

¹⁰⁸*See id.* (projecting revenue will almost double from 2016 to 2020).

¹⁰⁹*See id.* (quantifying the number of worldwide users that actively use a smartphone).

¹¹⁰*See id.* (estimating the availability of smartphones by 2020 will dramatically surpass any previous numbers).

¹¹¹*See* Jeff Grubb, *Kids' gaming makes up nearly 8% of mobile game spending worldwide*, VENTUREBEAT (Aug. 18, 2015), archived at <https://perma.cc/5TJV-9GGL> (graphing the spending on kids' mobile games, which was 9.3% of the mobile game market share and generated \$417 million dollars in revenue).

¹¹²*See id.* (stating that spending is not necessarily on free-to-play games, rather it is premium-priced games with upfront costs that account for the industry's revenue). COPPA limits the data that games can collect off of children under 13. *Id.* Additionally, parents tend to like premium-priced games because kids are less likely to bother them about buying "energy" or "gold" which are typical purchases that need to be made in games that are free to download. *Id.*; *see also* Tofel, *supra* note 36 (summarizing the hours kids under 13 spend per day on mobile devices). Inferring that the more often a kid plays an application, the more likely they are to want a premium version of a game. *Id.*

¹¹³*See The Walt Disney Company Reports Fourth Quarter and Full Year Earnings for Fiscal 2016*, DISNEY (Nov. 10, 2016), archived at <https://perma.cc/C6FQ-SCWM> (summarizing the operating earnings that make up The Walt Disney Company).

¹¹⁴*See id.* (quantifying the 2016 year-end fiscal results).

business: Licensing; Retail; Games and Apps; and Content.¹¹⁵ In the Games and Apps division, Disney internally develops, licenses, and co-develops mobile products for all ages.¹¹⁶ These mobile products, primarily consisting of mobile games, are the spotlight of the recent 2017 class action lawsuit.¹¹⁷

Over the past 30 years, Disney's game division has paralleled shifts in the gaming industry, as it has adapted to technological advancements.¹¹⁸ Since 2007, Disney has invested its resources in mobile gaming to mimic the trend in the gaming industry.¹¹⁹ Disney's games are downloaded nearly 1 million times per day and add about 70 million unique users per month in their total network of all applications they own.¹²⁰ Disney attempts to bring its magic to games.¹²¹ For Disney, it is all about storytelling.¹²² Disney knows that is why people show up to the theater for the latest Disney movie release.¹²³ Disney also knows that is why consumers download the

¹¹⁵See Disney Consumer Products and Interactive Media, *About Us*, DISNEY (2017), archived at <https://perma.cc/LT6N-ZZ54> (outlining the operations that are categorized under Consumer Products and Interactive Media).

¹¹⁶See *id.* (acknowledging their fan-base has a broad age-range from young child to old adult).

¹¹⁷See Fung & Shaban, *supra* note 5 (briefing readers on the components of the class action lawsuit against Disney); see also Disney, iTUNES (Feb. 24, 2018), archived at <https://perma.cc/XRS8-KFTX> (showing apps that Disney maintains). These apps include mobile games, apps to shop Disney products, apps to watch any of the television shows on Disney television networks, and apps to access theme park information. *Id.*

¹¹⁸See Willie Clark, *Disney's Many, Many Attempts at Figuring Out the Gaming Industry*, POLYGON (Nov. 18, 2017), archived at <https://perma.cc/RT4F-VY3E> (discussing the development of Disney's gaming segment).

¹¹⁹See *id.* (emphasizing Disney's adaptability). With children spending most of their time playing games on mobile devices, Disney has been quick to realize the profit potential of expanding their mobile gaming segment. *Id.* Disney invests in research and development of mobile gaming products to give them an edge in the mobile gaming industry. *Id.*

¹²⁰See Jeff Grubb, *How Disney's games are getting nearly 1M downloads a day and 70M unique users a month*, VENTUREBEAT (Mar. 20, 2015), archived at <https://perma.cc/B65Q-UZT4> (providing numeric details on Disney's users). Disney experiences consistent growth in its mobile applications. *Id.*

¹²¹See Clark, *supra* note 118 (noting how Disney quickly shifted focus to bringing its magical image to the mobile gaming segment).

¹²²See Clark, *supra* note 118 (focusing on the treasured Disney stories consumers know and love).

¹²³See Clark, *supra* note 118 (understanding the allure of magic).

game apps based on the movies they watch.¹²⁴ Disney wants to keep working on storytelling, and to do so it must expand its mobile gaming segment.¹²⁵ However, as Disney has expanded its mobile gaming segment, issues have arisen concerning its privacy protection practices specifically relating to COPPA.¹²⁶

C. Disney Mobile Gaming

Some of Disney's most popular mobile apps include Princess Palace Pets, Where's My Water, Moana Island Life, Beauty and the Beast, Frozen Free Fall, and Toy Story: Story Theater.¹²⁷ While Disney has stated that their games are for "fans of all ages", most users playing their mobile games are children under the age of 13.¹²⁸ With many of its users under the age of 13, Disney mobile apps are regulated under COPPA.¹²⁹ This means that Disney, being an operator of mobile applications played by users under the age of 13, can collect items such as geolocation, name, and address from users under 13 only after parents have consented.¹³⁰ Disney also outsources its mobile application development to three software companies: Upsight, Unity,

¹²⁴See Clark, *supra* note 118 (reasoning that consumers love Disney movies and stories and will download games that are based on these items).

¹²⁵See Clark, *supra* note 118 (highlighting that profit potential is in mobile gaming).

¹²⁶See Fung & Shaban, *supra* note 5 (evidencing the privacy concerns that led to the class action lawsuit against Disney). Privacy concerns are specifically related to COPPA. *Id.* Parents are worried that their children's information is being shared throughout the web for a profit, all without their consent. *Id.*

¹²⁷See Fung & Shaban, *supra* note 5 (listing popular Disney mobile games that have been named in the class action litigation).

¹²⁸See Fung & Shaban, *supra* note 5 (recognizing that children under the age of 13 account for the users playing the apps in question); see also Danielle Paquette, *The unexpected way Disney princesses affect little boys*, WASH. POST (June 22, 2016), archived at <https://perma.cc/4NJA-DB65> (studying 200 children, 96% of girls and 87% of boys had consumed some sort of Disney princess-centric media). These numbers allude to the target market of young children who play Disney's mobile games. *Id.*

¹²⁹See Children's Online Privacy Protection, *supra* note 46 (codifying that children under 13 are protected under COPPA regulations).

¹³⁰See Children's Online Privacy Protection, 15 U.S.C. § 6501 (1998) (providing the term "verifiable parental consent," which is defined as "any reasonable effort . . . to ensure that a parent of a child receives notice of the operator's personal information collection, use, and disclosure practices, and authorizes the collection, use, and disclosure . . . before that information is collected from that child").

and Kochava, due to their specialization in mobile gaming.¹³¹ These companies who work with Disney to create mobile games also fall under the COPPA regulation as third-parties who are subject to obtaining parental consent before tracking data of users under 13.¹³²

D. Disney's Lawsuit

As of May 2019, in *Rushing Et. Al v. The Walt Disney Company Et. Al*,¹³³ a class of parents, whose children under age 13 play Disney mobile games, claim that Disney and these third-party companies have violated COPPA by not receiving proper verifiable parental consent before collecting data from children.¹³⁴ Seeing as children under the age of 13 are playing Disney's games, the class action litigation was brought by parents of children "who, while playing online games via smart phone apps, have had their personally identifying information exfiltrated by [Disney] and its partners, for future commercial exploitation, in direct violation of the federal Children's Online Privacy Protection Act (COPPA)".¹³⁵ The plaintiffs seek to obtain an injunction for Disney to cease these practices, sequester illegally obtained information from their children, and receive damages.¹³⁶

Disney developed the mobile game app *Princess Palace Pets* which has been marketed on app stores since 2013.¹³⁷ This app was

¹³¹See Charlie May, *Big Brother Mickey: Class-action lawsuit alleges Disney spied on children through several apps*, SALON (Aug. 9, 2017), archived at <https://perma.cc/Y3XA-Q3YF> (stating the three software companies who work with Disney to create mobile applications). These companies are privy to mobile game development techniques. *Id.*

¹³²See 15 U.S.C. § 6501 (including third-parties who are involved in software and marketing under the definition of "operator"). As a third-party who provides services to a company directed towards children, they must also be regulated under COPPA. *Id.*

¹³³See Complaint, *Rushing v. The Walt Disney Co.*, (N.D. Cal. 2017) (No. 3:17-CV-4419) (identifying a lawsuit against the Walt Disney Company for violating COPPA).

¹³⁴See Complaint, *supra* note 133, at 37 (accusing Disney and third-party companies of improperly collecting data from children without verifiable parental consent in violation of COPPA).

¹³⁵See Complaint, *supra* note 133, at 1 (articulating Disney's violation of COPPA).

¹³⁶See Complaint, *supra* note 133, at 1 (contending that the plaintiffs are entitled to remedies at law).

¹³⁷See Complaint, *supra* note 133, at 36 (detailing the apps at issue in the lawsuit against Disney). Disney's *Princess Palace Pets* and the other *Game Tracking Apps*

the first named in the lawsuit, and after plaintiffs' investigation, over forty other Disney apps ("Game Tracking Apps") have also been named.¹³⁸ On January 14, 2014, Ms. Rushing, the initial plaintiff to the lawsuit, downloaded Princess Palace Pets onto her daughter's mobile device.¹³⁹ Thereafter, plaintiff's daughter frequently played Disney's Princess Palace Pets on this device.¹⁴⁰ It is alleged that Disney embedded advertising tracking software which collected, disclosed, or used personal information and persistent identifiers of the daughter, including location, name, address, and email address.¹⁴¹ Plaintiff asserts that Disney did not collect her daughter's personal information to provide support for internal operations, but instead to profile her daughter for commercial gain by selling the collected data

are directed to children under age 13. *Id.* at 44. For example, Princess Palace Pets is a game in which users can groom, bathe, accessorize, and play with about 10 different pets. *Id.* In the Apple Store, Google Play Store, and Amazon, Princess Palace Pets is rated as a game for children younger than 5, or for "everyone" or "all ages." *Id.* at 45.

¹³⁸See Complaint, *supra* note 133, at 9-10 (highlighting more than 40 apps in question that obtained personal information of children without parental consent). The apps include:

AvengersNet, Beauty and the Beast: Perfect Match, Cars Lightening League, Club Penguin Island, Color by Disney, Disney Color and Play, Disney Crossy Road, Disney Dream Treats, Disney Emoji Blitz, Disney Gif, Disney Jigsaw Puzzle!, Disney LOL, Disney Princess: Story Theater, Disney Store Become, Disney Story Central, Disney's Magic Timer by Oral-B, Disney Princess: Charmed Adventures, Dodo Pop, Disney Build It Frozen, DuckTales: Remastered, Frozen Free Fall, Frozen Free Fall: Icy Shot, Good Dinosaur Storybook Deluxe, Inside Out Thought Bubbles, Maleficent Free Fall, Miles from Tomorrowland: Missions, Moana Island Life, Olaf's Adventures, Palace Pets in Whisker Haven, Sofia the First Color and Play, Sofia the First Secret Library, Star Wars: Puzzle Droids™, Star Wars™: Commander, Temple Run: Oz, Temple Run: Brave, The Lion Guard, Toy Story: Story Theater, Where's My Water?, Where's My Mickey?, Where's My Water? 2, Where's My Water? Lite/ Where's My Water? Free, Zootopia [and] Crime Files: Hidden Object.

Id. at 9-10.

¹³⁹See Complaint, *supra* note 133, at 9-10 (pointing out the Disney mobile games that were downloaded).

¹⁴⁰See Complaint, *supra* note 133, at 23 (distinguishing how plaintiff's daughter got access to the app by downloading it on her mobile device).

¹⁴¹See Complaint, *supra* note 133, at 11 (alleging Disney implements tracking software in mobile applications).

to third-party advertisers.¹⁴² Also, plaintiff alleges that Disney never asked Ms. Rushing for her verifiable parental consent, as required by COPPA.¹⁴³

So how specifically is Disney allegedly violating COPPA?¹⁴⁴ Typically, the app developer (such as Disney or one of its third-party affiliates) installs a software development kit onto one of its apps, which collects persistent identifiers.¹⁴⁵ The persistent identifiers collect information such as app usage, geographic location (which is likely to include home address), and internet navigation; anytime a user accesses the internet, their navigation is tracked and monitored.¹⁴⁶ Then, this information is packaged into a profile and sold to an advertising network (“Ad Network”).¹⁴⁷ An Ad Network will store the gathered information on physical servers.¹⁴⁸ Ad Networks or other third-parties can then buy and sell data and exchange databases amongst each other, and the data is then analyzed.¹⁴⁹ How, when, and why a child uses her mobile device, along with demographic and psychographic inferences that can be drawn therefrom, become financially valuable.¹⁵⁰ The smart-device and specific user will then

¹⁴²See Complaint, *supra* note 133, at 10 (noting the concern for commercial exploitation in regard to children).

¹⁴³See Complaint, *supra* note 133, at 15 (violating the verifiable parental consent requirement of COPPA). The Plaintiff claims Disney did not initiate any type of parental consent collection process and has been collecting data from under 13 users in violation of COPPA. *Id.*

¹⁴⁴See Complaint, *supra* note 133, at 5 (questioning how Disney has violated COPPA). Disney is using their apps for commercial exploitation. *Id.*

¹⁴⁵See Complaint, *supra* note 133, at 2 (noting the software that is embedded in the applications). Software has been embedded in the apps to specifically track and collect data. *Id.*

¹⁴⁶See Complaint, *supra* note 133, at 4 (describing the information collected by the embedded software).

¹⁴⁷See Complaint, *supra* note 133, at 4 (defining who receives the collected information). Disney is packaging the data and selling it. *Id.*

¹⁴⁸See Complaint, *supra* note 133, at 5-6 (determining where the data is stored). Data is stored on large servers. *Id.*

¹⁴⁹See Complaint, *supra* note 133, at 5-6 (recognizing the business of buying and selling consumer data). Data can essentially be bought or sold specifically to any large company who is in the practice of buying or selling data. *Id.*

¹⁵⁰See Complaint, *supra* note 133, at 5-6 (acknowledging the financial benefits for companies to buy and sell data). Disney can collect data from children and sell it to ad companies for a high profit margin since the information is very valuable for the ad companies. *Id.* These ad companies can send ads to consumers and children based on the likelihood that consumers will purchase the products they are offering.

receive targeted ads based on their profile in an attempt for companies to exploit potential profits.¹⁵¹

As of May 2019, an answer from Disney as to the plaintiff's allegations has not been published.¹⁵² A representative for Disney did, however, make a brief comment to the press.¹⁵³ The spokesperson stated that Disney has "a robust COPPA compliance program."¹⁵⁴ The representative also claimed that Disney "maintain[s] strict data collection and use policies for Disney apps created for children and families."¹⁵⁵ The Disney spokesperson did not claim they were violating COPPA, but instead claimed that the plaintiffs' complaint "is based on a fundamental misunderstanding of COPPA principles, and [they] look forward to defending this action in court."¹⁵⁶ The section on Disney's website regarding COPPA was updated on October 16th, 2017, two months after the complaint filed by plaintiffs, and the policy states that Disney will email parents if parental consent is required.¹⁵⁷ Over the coming months, this class action litigation will continue to unfold, and Disney, along with other companies whose practices fall under COPPA, should be aware of their privacy protection and parental consent policies.

Id. While being financially valuable to the ad companies, this can be attributable to a significant invasion of privacy for the consumer. *Id.*

¹⁵¹See Complaint, *supra* note 133, at 10-11 (concluding that consumers are more likely to purchase goods and services that are specifically targeted to their habits and preferences).

¹⁵²See May, *supra* note 131 (establishing that one of the only published court filings is the plaintiffs' complaint). As of early 2019, the case has not gone to trial. *Id.*

¹⁵³See May, *supra* note 131 (contending that a spokesperson for Disney did make a brief statement to the press when asked about the allegations).

¹⁵⁴See May, *supra* note 131 (supporting Disney's established COPPA policies). Disney reps believe Disney has enacted correct COPPA policies. *Id.*

¹⁵⁵See May, *supra* note 131 (declaring Disney's policies are accurate and appropriate).

¹⁵⁶See May, *supra* note 131 (dismissing the COPPA allegations and arguing that plaintiffs do not have an accurate understanding of COPPA).

¹⁵⁷See *Children's Privacy Policy*, DISNEY (Oct. 16, 2017), archived at <https://perma.cc/965H-5HNR> (outlining Disney's COPPA parental consent practices). In the event Disney wants to collect personal information, they will "first seek a parent or guardian's consent by email. In the email [they] will explain what information [they] are collecting, how [they] plan to use it, how the parent can provide consent, and how the parent can revoke consent. If [they] do not receive parental consent within a reasonable time, [they] will delete the parent contact information and any other information collected from the child in connection with that activity." *Id.*

IV. Analysis

In today's technological world, privacy concerns are of the utmost importance.¹⁵⁸ With a significant number of children using the internet, concerns arise surrounding their wellbeing and security.¹⁵⁹ In the early years of the internet, the U.S. saw an outcry from parents concerning children's safety.¹⁶⁰ With this outcry came COPPA, and Disney needed to adapt.¹⁶¹ Twenty-five years later, as technology is paramount to daily living, it is of the utmost importance that Disney and other companies adhere to the policies and procedures set in place by governmental regulations to provide a safe internet environment for children.¹⁶²

It is likely that Disney has violated COPPA, however, as seen from other companies with similar violations, the potential outcome of the 2017 class action lawsuit is a financial settlement.¹⁶³ As evidenced

¹⁵⁸See Scott, *supra* note 9 (discussing that misuse of information significantly attributes to the fear of using the internet, specifically for children).

¹⁵⁹See SCOTT, *supra* note 80, at 5 (positing that as technology becomes increasingly accessible, the potential for misuse and invasion of privacy contributes to the growing concern of protection for children using the internet).

¹⁶⁰See Pasierbinska-Wilson, *supra* note 38 (examining the origins of the COPPA regulations and how original privacy protection was enacted to protect against child predators, but as technology has evolved, the focus has shifted to protecting children and their personal information for re-sale and targeted advertising).

¹⁶¹See Clark, *supra* note 118 (analyzing Disney's attempts to keep up with the gaming industry and target the age group of children under 13 to churn a profit). Once again, this alludes to Disney forgoing collecting parental consent to increase their profits through selling data tracked and collected from consumers. *Id.*

¹⁶²See *Complying with COPPA*, *supra* note 47 (focusing on the idea behind COPPA as enacted today, that companies are using information they collect to sell it to third-party advertisers and increase their profit potential, without necessarily focusing on the privacy implications).

¹⁶³See *Web Sites*, *supra* note 67 (providing examples of companies agreeing to financial settlement when charged with violating COPPA); see also *Largest COPPA Civil Penalties*, *supra* note 75 (warning that COPPA violations will result in expensive financial settlements); *Mobile Apps*, *supra* note 87 (pointing to the FTC's first case dealing with apps, which ended in a \$50,000 settlement); *Two App*

by Disney's policies and practices, it attempts to appeal to "fans of all ages", and many times these fans are under 13 years old.¹⁶⁴ While the profit potential from mobile game sales to fans under 13 years old puts Disney in the top of the Fortune 500 companies, these profits come with an added cost: the cost of privacy protection.¹⁶⁵

Due to the heightened awareness of internet privacy protection, parents are actively monitoring their children's internet usage by restricting apps their children use, placing child protection software on devices, and also being more aware of what their children download.¹⁶⁶ This is evidenced by the class action lawsuit against Disney.¹⁶⁷ Parents are concerned that smartphones, tablets, and other internet-connected gaming devices are intruding upon the privacy and safety of children.¹⁶⁸ It is more than simply collecting data such as a username or email address.¹⁶⁹ Plaintiffs' lawsuit alleges that Disney collects

Developers, supra note 91 (reporting that two app developers were ordered to pay a combined total of \$360,000 as settlements with the FTC).

¹⁶⁴*See* Fung & Shaban, *supra* note 5 (highlighting the fan-base that Disney reaches, including children under age 13, the age group discussed in COPPA regulations).

¹⁶⁵*See* #176 *Disney*, FORTUNE GLOBAL 500 (Jan. 25, 2019), *archived at* <https://perma.cc/W84T-2BKF> (ranking Disney at 176 on the Fortune Global 500 list). Disney's rank on the Global 500 list alludes to the need for Disney to churn a profit at any cost, even if that means the privacy protection of children. *Id.* Disney would benefit by collecting data from children and selling it to ad-networks without having to be inhibited by parents. *Id.*; Complaint, *supra* note 133, at 6 (discussing Disney's commercially exploitive use of sharing children's information with third parties without parental consent).

¹⁶⁶*See* Pasierbinska-Wilson, *supra* note 38 (setting forth the heightened scrutiny of businesses who provide internet-based services to children under 13).

¹⁶⁷*See* Fung & Shaban, *supra* note 5 (offering the information surrounding the class action litigation filed against Disney for violating children's privacy protections by illegally collecting data without first obtaining parental consent, all in direct violation of COPPA). As noted, COPPA regulations require businesses who provide internet-based services to children under 13 years old to collect verifiable parental consent about the business' data collection procedures. *Id.*

¹⁶⁸*See* Fung & Shaban, *supra* note 5 (summarizing the allegations in the class action litigation and highlighting the justification for requiring parental consent before collecting any data).

¹⁶⁹*See* Fung & Shaban, *supra* note 5 (stressing the need for parental consent when it comes to businesses collecting data from children, particularly information containing personal information, geolocation, and home address, which are all safety and privacy concerns). If Disney did not obtain verifiable parental consent prior to collecting data that can be bought or sold, they are in direct violation of COPPA. *Id.*; *see also Children's Online Privacy Protection Rule: A Six-Step Compliance Plan for Your Business, supra* note 13 (setting forth what constitutes a COPPA violation).

more obscure data, like a smartphone's persistent identifiers which are unique to individual mobile devices and digital files.¹⁷⁰ At a first glance, this collection process does not seem like a significant issue, but when the data that is tracked can be bought or sold to other companies it becomes a significant invasion of privacy.¹⁷¹ The real issue for Disney is that children, who do not necessarily understand or are not able to consent to the collection, are unknowingly sharing their information.¹⁷² This is why Disney falls under COPPA: it is the responsibility of Disney to notify parents about the collection.¹⁷³ Disney must allow parents who have the knowledge and maturity to consent to the collection process and make the decision for their child.¹⁷⁴ It cannot be a unilateral decision of Disney to invade privacy and track data without adhering to policies and procedures.¹⁷⁵

Disney ultimately would benefit by collecting data from children and selling it to ad-networks without having to be inhibited by parents.¹⁷⁶ Parents may not consent to the collection process and therefore lessen overall profit potential for Disney who could

¹⁷⁰See Complaint, *supra* note 133, at 4 (stipulating Disney's use of persistent identifiers). Parents do not want a child's geolocation, home address, habits, and links they click on to be tracked and monitored and later packaged and sold for commercial exploitation. *Id.*

¹⁷¹See Complaint, *supra* note 133, at 5 (describing the information collected by the embedded software causes a concern for parents because businesses are essentially spying on the children and monitoring their habits).

¹⁷²See Complaint, *supra* note 133, at 6 (making the point that children cannot consent). It is the parent who should have the control over the child's internet habits. *Id.*

¹⁷³See Complaint, *supra* note 133, at 6-7 (stressing the importance of COPPA regulations and that Disney must adhere to the consent policies required by COPPA). Disney cannot evade COPPA regulations for commercial exploitation. *Id.*

¹⁷⁴See Complaint, *supra* note 133, at 6 (alluding to the fundamental idea that children do not possess the capability to consent on their own, and that is why adherence to COPPA regulations is so important, because parents have the sophistication to monitor their children's internet-usage and must be afforded the opportunity to consent).

¹⁷⁵See Complaint, *supra* note 133, at 10 (subjecting Disney to scrutiny for unilaterally collecting data from children without properly addressing COPPA regulations and the need for parents to have control over their children's internet usage).

¹⁷⁶See *Fortune 500*, *supra* note 4 (quantifying Disney's profits). This alludes to Disney wanting to collect data in order to sell it and make a profit. *Id.*; see also *See The Walt Disney Company Reports Fourth Quarter and Full Year Earnings for Fiscal 2016*, DISNEY (Nov. 10, 2016), archived at <https://perma.cc/C6FQ-SCWM> (providing the full year results of Disney profits from fiscal year 2016).

potentially sell the collected data.¹⁷⁷ This is the fundamental idea behind the lawsuit: Disney, being an entertainment giant, is illegally collecting data from children by evading the COPPA government rules and regulations, just to turn a profit.¹⁷⁸

While the response from Disney has been minimal, it is hard to decipher how the company plans to defend the lawsuit.¹⁷⁹ A Disney representative has alluded to the belief that their privacy policies and procedures adhere to COPPA regulations, yet, as seen before with many other companies, COPPA policies may not be perfect.¹⁸⁰ However, many children and adults have faith in Disney.¹⁸¹ After all, it is one of the most magical companies on earth.¹⁸² Disney's gaming apps have been downloaded millions of times, the number of daily app users continues to rise, and it continues to top the charts as an entertainment giant.¹⁸³

If Disney were to defend the lawsuit, it would need to speak of its reputation and recognition.¹⁸⁴ If there is potential that a court could conclude that Disney did violate COPPA, it would be a necessity to

¹⁷⁷See *The Walt Disney Company Reports Fourth Quarter and Full Year Earnings for Fiscal 2016*, *supra* note 176 (demonstrating strong revenue growth and the largest quarter Disney had seen in its history).

¹⁷⁸See Complaint, *supra* note 133, at 9 (suggesting Disney may disregard COPPA regulations because the profit potential they receive from selling the data that they allegedly illegally collect far exceeds any concern for COPPA, children's privacy, and the right of parents to monitor their children's activity online).

¹⁷⁹See May, *supra* note 131 (quoting a representative for Disney who dismissed the COPPA allegations and believes that Disney may not be at fault and may not have violated COPPA).

¹⁸⁰See May, *supra* note 131 (relying on the statement from Disney's representative which alludes to Disney's belief that they are not at fault and the plaintiffs do not accurately understand COPPA). This may be their defense to the class action litigation if brought to trial. *Id.*

¹⁸¹See Grubb, *supra* note 120 (understanding the fan base of Disney includes children and adults). This large fan base keeps Disney as one of the most beloved and profitable companies. *Id.*

¹⁸²See Grubb, *supra* note 120 (explaining that Disney is aware of what draws fans in to see their products, and will further take their strength of "story telling" to new ventures, while ensuring it continues to bring in consumers).

¹⁸³See Grubb, *supra* note 120 (quantifying the growing number of users who participate in Disney's mobile gaming and this growing number of user's supports the reputation and recognition of Disney).

¹⁸⁴See Grubb, *supra* note 120 (recognizing that it is the past quality of services and products which make Disney an entertainment giant in its industry).

avoid bad press.¹⁸⁵ The feelings of fun and excitement that Disney evokes would need to be at the forefront of their business mission, and Disney could not allow a lawsuit to disrupt their image.¹⁸⁶ At that point, it would be advantageous to pay FTC fines through a settlement, and financial compensation to the injured families, both to avoid litigation and a depredation to their business and profits.¹⁸⁷

It has been done before; many large companies that fall under COPPA have opted for a settlement.¹⁸⁸ As seen from previous examples with companies like Hershey, Mrs. Fields, and W3 Innovations, when alleged of COPPA violations and illegally collecting data from children under 13 without parental consent, these companies have paid FTC assessed fines and worked to restructure their data collection processes.¹⁸⁹ More importantly, with a settlement option, these companies have not admitted fault.¹⁹⁰ The settlement process does not attribute fault to the defendants in the litigation.¹⁹¹

¹⁸⁵See *About*, *supra* note 2 (harboring on the importance of Disney's reputation and recognition in the industry, and its mission to be at the forefront of creative content creation). Bad press can be detrimental to Disney's pride and reputation in the industry, and by inducing a settlement, it would allow Disney to maintain its wholesome image in the industry. *Id.*

¹⁸⁶See Grubb, *supra* note 120 (highlighting Disney's quality-over-quantity business strategy); see also *About*, *supra* note 2 (articulating the positive image Disney attempts to portray). A significant lawsuit could change this positive image. *Id.*

¹⁸⁷See *Web Sites*, *supra* note 67 (exemplifying the benefits of lawsuit settlements in comparison to lengthy litigation). Numerous settlements have required companies to pay civil penalties for COPPA violations in addition to case-specific limitations and restrictions. *Id.*; see also *About*, *supra* note 2 (considering the importance of name and reputation for Disney, and the impact they have on Disney's profits and financial superiority in the industry). Disney is built on its allure and reputation, and the potential to lose consumers could have a financial impact on its bottom-line profits. *Id.*

¹⁸⁸See *Web Sites*, *supra* note 67 (citing companies that have avoided litigation and settled COPPA violations with a financial settlement). As seen from other companies that provide internet-based services to children under age 13, COPPA violation can incur FTC penalties. *Id.*

¹⁸⁹See *Largest COPPA Civil Penalties*, *supra* note 75 (detailing the penalties that the FTC imposes on companies to prevent future COPPA violations); see also *Web Sites*, *supra* note 67 (addressing companies that provided internet-based gaming to children under 13 and their violations of COPPA concluding with a financial settlement).

¹⁹⁰See *Web Sites*, *supra* note 67 (contending that these companies alleged to be in violation of COPPA have not necessarily admitted fault through the settlement process).

¹⁹¹See *Web Sites*, *supra* note 67 (clarifying that settlement is not a court decree, and a defendant has not admitted fault to the allegations by paying fines to the FTC). As

This is another reason settlement is a viable option for Disney.¹⁹² Without a court decree of fault, Disney's name is not tarnished, and its reputation and recognition are protected.¹⁹³

Additionally, settlement is not financially burdensome.¹⁹⁴ As seen from COPPA violation cases previously discussed, FTC settlement amounts have been well under a few hundred thousand dollars.¹⁹⁵ When looking at Disney, a multi-billion-dollar company topping the Fortune 500 list, similar fines would be a very small fraction of their business operating expenses.¹⁹⁶ Costs of attorney's fees, costs of damages and awards, and other miscellaneous costs associated with taking the class action lawsuit through a full trial, can well exceed the average costs of FTC fines for COPPA violations.¹⁹⁷ At the early stages of the process, a settlement option for paying fines to the FTC and injured families can be financially advantageous to Disney.¹⁹⁸

highlighted by the cases discussed in this note, the companies have not admitted to any fault regarding the COPPA allegations. *Id.*

¹⁹²See *Web Sites*, *supra* note 67 (highlighting companies do not admit fault and Disney would not need to admit fault for COPPA violations). If other companies have set a precedent for paying fines and not admitting fault, it would logically follow that Disney does not admit fault and simply pays FTC fines and maybe some type of financial compensation to the injured plaintiffs. *Id.*

¹⁹³See *About*, *supra* note 2 (stressing the importance of Disney's reputation, and how its image in the industry is what continues to grow its brand).

¹⁹⁴See *Web Sites*, *supra* note 67 (noting the minimal financial penalties incurred by companies that have been accused of COPPA violations). This is evident with the other companies mentioned in this Note regarding settlement. *Id.* The companies have not admitted fault and have merely paid fines. *Id.*

¹⁹⁵See *Web Sites*, *supra* note 67 (exposing the rather low financial fines imposed by the FTC when a company allegedly violates COPPA). Compared to companies that make multi-million-dollar profits, fines of only a few hundred thousand appear minimal. *Id.*

¹⁹⁶See *Fortune 500*, *supra* note 4 (comparing Disney's multi-billion-dollar operation to other companies who have received fines under a few hundred thousand dollars). The potential fines are very minimal compared to Disney's overall business operations. *Id.*

¹⁹⁷See *Watts*, *supra* note 73 (noting the minimal financial penalties incurred by companies that have been accused of COPPA violations can be advantageous to pay when compared to considering the full cost of litigation and taking a case to trial).

¹⁹⁸See *Watts*, *supra* note 73 (stipulating that Disney can simply pay the fines imposed, which from past precedent may be very minimal compared to Disney's overall profits and can save itself the costs associated with taking a case through trial where the outcome could cost significantly more).

However, there are some negatives to settlement.¹⁹⁹ Disney, being an entertainment giant, may set a precedent for other companies in the mobile gaming industry.²⁰⁰ Due to its brand strength and recognition, if it were to evade litigation and pay what seems to be minimal fines, it may down-play the importance of COPPA regulations.²⁰¹ Other companies may follow suit and not put importance on their COPPA policies either.²⁰² If it is as easy as paying a minimal fine, Disney and other companies would not have an incentive to rework their collection practices.²⁰³ This would defeat the entire purpose of FTC and COPPA regulations.²⁰⁴

More so, the plaintiffs may not be accurately compensated for their reported injuries.²⁰⁵ As outlined by the lawsuit, plaintiffs demand that Disney delete or destroy all of the collected data.²⁰⁶ If the case

¹⁹⁹See *Complying with COPPA: Frequently Asked Questions*, *supra* note 47 (justifying the importance of abiding by COPPA and emphasizing how a settlement would not align with the general goal of protecting children).

²⁰⁰See *About*, *supra* note 2 (laying out Disney's mission to lead the world in developing "the most creative, innovative and profitable entertainment experiences and related products in the world").

²⁰¹See *Complying with COPPA: Frequently Asked Questions*, *supra* note 47 (focusing on the importance of COPPA regulations and the need for children's protection while online, which could be minimized by paying fines). If companies simply pay fines, there is no incentive to abide by COPPA. *Id.*

²⁰²See *About*, *supra* note 2 (acknowledging that Disney "manages the world's largest media company and are the visionaries behind some of the most respected and beloved brands around the globe"); see also *Children's Privacy Policy*, *supra* note 157 (recognizing that if Disney wants to use a child's personal information, it must first seek a parent's consent by email per COPPA regulations).

²⁰³See *Complying with COPPA: Frequently Asked Questions*, *supra* note 47 (circumventing the importance of COPPA, Disney could easily pay fines and not fully rework their COPPA policies which would affect children and their privacy).

²⁰⁴See *Complying with COPPA: Frequently Asked Questions*, *supra* note 47 (reaffirming the importance of online privacy protection for children and the need to abide by COPPA regulations). Children do not have the ability to consent to their information being tracked and monitored, it is the roll of the parents to do so, and companies are not allowing parents the control. *Id.*

²⁰⁵See *Complaint*, *supra* note 133, at 6 (highlighting that the purpose of COPPA stems from the need to protect the "vulnerability of children in the internet age" and requires that the developers of children's applications must obtain verifiable consent from the parents of the children under 13 years old who use these applications). Plaintiffs have reported financial injuries, as well as requiring Disney to delete all data off its servers that it had previously collected from the applications in question. *Id.*

²⁰⁶See *Complaint*, *supra* note 133, at 6 (finding that collecting data from children is impermissible under COPPA as this data possess an incredible risk to children and

were settled, there may not be an imposition on Disney to delete or destroy this data.²⁰⁷ Once again, the fundamental idea behind COPPA, privacy protection for children online, is defeated by the settlement process.²⁰⁸ The information collected by Disney will still be available on advertiser servers and can still be transferred or sold.²⁰⁹ The harm suffered by the plaintiffs and their children will not be rectified.²¹⁰ Additionally, the incentive to rework their parental consent policies may not be available in the settlement process.²¹¹ If not mandated to change their policies, the tracking and monitoring will continue to go on.²¹² Once again, this is defeating the purpose of COPPA.²¹³

their privacy). This data is harvested by advertising companies who can target children directly, and Disney is financially profiting by selling this data to the advertisers. *Id.* It is a direct form of commercial exploitation which Congress tries to prevent through its COPPA enactment. *Id.*

²⁰⁷*See Complying with COPPA: Frequently Asked Questions, supra* note 47 (highlighting other companies have not necessarily been required to update their privacy policies or parental consent procedures, and if Disney settles, they may not be required to update their policies and procedures).

²⁰⁸*See Complying with COPPA: Frequently Asked Questions, supra* note 47 (explaining how the fundamental idea is to protect children and prevent the exposure of their personal information, and settlement would not give the children injured in the lawsuit the deletion of their data).

²⁰⁹*See Complying with COPPA: Frequently Asked Questions, supra* note 47 (guaranteeing the protection of data, COPPA was enacted to allow parents more control over their children's online privacy). With Disney settling the allegations, the control is taken away from parents and circumvents the enactment of COPPA. *Id.*

²¹⁰*See Complaint, supra* note 133, at 7 (focusing on the fact that COPPA serves to protect "personal information" of children because this information consists of "persistent identifier[s] that can be used to recognize a user over time and across different Web sites or online services."). When Disney settles, there is no guarantee that they will update their policies and delete the information collected prior to the settlement. *Id.* at 9.

²¹¹*See Complying with COPPA: Frequently Asked Questions, supra* note 47 (noting other companies have not necessarily been required to delete data). If Disney settles, there may be no incentive for them to delete the data that they tracked and monitored, and the plaintiffs are not accurately compensated. *Id.*

²¹²*See Complying with COPPA: Frequently Asked Questions, supra* note 47 (explaining the importance of protecting data). Parents do not want data floating around on the internet and being sold for a profit, and they want control over their children's data. *Id.* If Disney settles, this control is taken away, and parents and children are not compensated for the harm they suffered. *Id.*

²¹³*See Complying with COPPA: Frequently Asked Questions, supra* note 47 (stressing the fundamental importance of COPPA). If Disney settles, COPPA is irrelevant and plaintiffs' harm is not rectified. *Id.*

V. Conclusion

When considering all the positives and negatives of settlement, it is likely Disney will settle the claims brought against them. It seems that the positives outweigh the negatives of settlement. With a quicker, more cost-effective process, Disney can pay minimal fines, update its privacy policies, and settle with the parents in the class action, all while maintaining its wholesome image and reputation. Disney prides itself as being a financial conglomerate in the mobile gaming industry and it illuminates a magical image in the minds of consumers. To maintain its respect, image, and profit potential it would be advantageous to keep the press about its alleged COPPA violations minimal and simply settle and move along.

Overall, COPPA needs reform due to the changing Internet landscape and the threats posed to children online in today's world. Children are not always able to protect themselves against commercial exploitations. Parents are meant to shield children from online predatory practices, however with today's internet landscape, it is becoming increasingly difficult to regulate children's behavior and protect them from abusive marketing. It is imperative companies follow COPPA regulations and that the FTC actively monitors website providers. Children's safety is of the utmost importance. As seen from the Disney allegations, even a company that consumers know and love may be putting aside effective safety measures just to turn a profit and keep themselves a leader in the mobile gaming industry. If it was not as easy to settle cases with minimal penalties, it may cause companies to think twice before they potentially violate COPPA and expose children.